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In the Supreme Court of the United States

JENNY RUBIN, ET AL., PETITIONERS

v.

ISLAMIC REPUBLIC OF IRAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*, the property of a foreign state and its agencies or instrumentalities is generally immune from attachment or execution, except as provided in 28 U.S.C. 1610 and 1611. Section 1610(a) provides that a foreign state's property "used for a commercial activity in the United States" is not immune in certain circumstances. 28 U.S.C. 1610(a). And Section 1610(g) provides that the property of a foreign state against which a judgment is rendered in certain terrorism-related cases, and the property of its agencies or instrumentalities, is subject to attachment "as provided in this section," regardless of five factors. 28 U.S.C. 1610(g)(1). The questions presented are:

1. Whether 28 U.S.C. 1610(g) creates a freestanding exception to attachment immunity, or instead simply abrogates distinctions between a foreign state and its agencies and instrumentalities for purposes of attachment, while still requiring a judgment creditor to proceed "as provided in this section," such as under 28 U.S.C. 1610(a).

2. Whether the commercial-activity exception to execution immunity in 28 U.S.C. 1610(a) applies only when the foreign state itself (rather than a third party) has used the property in commercial activity.

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to the first question presented by the petition.

STATEMENT

Petitioners are seeking to enforce a money judgment against respondent Islamic Republic of Iran by attaching artifacts that Iran owns and that respondent University of Chicago possesses. The district court granted summary judgment to respondents, holding that the property was immune from attachment and execution under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.* Pet. App. 44. The court of appeals affirmed. *Id.* at 1-38.

1. The FSIA provides that, subject to certain international agreements, the property in the United States of a foreign state, and its agencies or instrumentalities, "shall be immune from attachment arrest and execution," except as provided in 28 U.S.C. 1610 and 1611. 28 U.S.C. 1609; see 28 U.S.C. 1603(a) (defining "foreign state"). Section 1611 is not at issue here.

a. Subsections (a) and (b) of Section 1610 create exceptions for property with a commercial nexus. Subsection (a) provides that a foreign state's property "used for a commercial activity in the United States" is not immune from attachment if additional criteria are satisfied. 28 U.S.C. 1610(a).[1] Subsection (b) creates an additional exception for the property of an agency or instrumentality. 28 U.S.C. 1610(b). Unlike property covered by subsection (a)—which must *itself* be used in commercial activity—subsection (b) abrogates attachment immunity for any property "of an agency or instrumentality" if the agency or instrumentality is "engaged in commercial activity in the United States" and additional criteria are satisfied. *Ibid.*

Pursuant to the additional criteria in both provisions, property with the requisite commercial nexus is not immune from attachment if (among other things) the judgment that the plaintiff is seeking to enforce relates to a claim for which the entity "is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008)." 28 U.S.C. 1610(a)(7); see 28 U.S.C. 1610(b)(3) (similar). The referenced provisions are known as the "terrorism exception" to a foreign sovereign's immunity to suit.

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[1] This brief uses the term "attachment" to refer to attachment, arrest, and execution.

The terrorism exception was originally codified at 28 U.S.C. 1605(a)(7). See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a)(1)(C), 110 Stat. 1241. Section 1605(a)(7) provided that designated state sponsors of terrorism would not be immune from suits seeking money damages for personal injury or death "caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support" for such acts. 28 U.S.C. 1605(a)(7) (2006). On January 28, 2008, Congress repealed that provision and replaced it with 28 U.S.C. 1605A. See National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, § 1083(a)(1) and (b)(1), 122 Stat. 338-341. Among other things, Section 1605A expressly creates a private right of action for certain injuries caused by designated state sponsors of terrorism. 28 U.S.C. 1605A.[2]

Accordingly, if a party obtains a money judgment under the current or former terrorism exception, that judgment creditor may be able to enforce the judgment by attaching property with the requisite commercial nexus under 28 U.S.C. 1610(a)(7) or (b)(3).

b. When Congress updated the terrorism exception in 2008, it also added subsection (g) to 28 U.S.C. 1610. NDAA § 1083(b)(3)(D), 122 Stat. 341-342. Subsection (g) provides:

> [T]he property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical

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[2] The statute allowed plaintiffs with pending cases under Section 1605(a)(7) to convert their actions, in certain circumstances, to suits under Section 1605A. NDAA § 1083(c)(2), 122 Stat. 342-343.

> entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment *as provided in this section*, regardless of [five specified factors].

28 U.S.C. 1610(g)(1) (emphasis added).

The five factors listed in subsection (g)(1) almost perfectly parallel the factors that some courts have considered when a party seeks to satisfy a judgment against a foreign state by attaching property belonging not to the state itself, but to an agency or instrumentality. In *First National City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (*Bancec*), this Court recognized a general presumption that courts should respect the separate legal status of a state's agencies and instrumentalities. *Id.* at 626-628. A foreign state's judgment creditor therefore generally cannot satisfy that judgment by attaching the property of an agency or instrumentality. That presumption may be overcome as appropriate under the totality of the circumstances, however, if the instrumentality is "so extensively controlled by its owner that a relationship of principal and agent is created," or if recognizing the entity's separate juridical status would "'work fraud or injustice.'" *Id.* at 629 (quoting *Taylor* v. *Standard Gas Co.*, 306 U.S. 307, 322 (1939)); see *id.* at 633. Some courts have identified "*Bancec* factors" to consider in making that determination. Pet. App. 23-26; see, *e.g.*, *Walter Fuller Aircraft Sales, Inc.* v. *Republic of the Philippines*, 965 F.2d 1375, 1380 n.7 (5th Cir. 1992). Subsection (g) thus establishes that courts need not engage in a *Bancec* analysis in enforcement proceedings in covered terrorism cases. See Pet. App. 26.

c. Subsection (f) of Section 1610 creates a mechanism for attaching property in certain terrorism cases, but that mechanism has never been operative. 28 U.S.C. 1610(f). Paragraph (f)(1) provides that certain assets blocked under various sanctions programs are subject to attachment or execution "of any judgment relating to a claim for which a foreign state (including any agency or instrumentality o[f] such state) claiming such property is not immune" under the terrorism exception. 28 U.S.C. 1610(f)(1). Paragraph (f)(2) provides that the State and Treasury Departments "should make every effort" to assist terrorism judgment creditors in identifying attachable property. 28 U.S.C. 1610(f)(2). Paragraph (f)(3) provides, however, that the President may waive "any provision of paragraph (1) in the interest of national security." 28 U.S.C. 1610(f)(3). Invoking that authority, the President waived paragraph (f)(1) before it ever went into effect. See 65 Fed. Reg. 66,483 (Oct. 28, 2000); see also 63 Fed. Reg. 59,201 (Oct. 21, 1998) (superseded waiver of predecessor statute).

2. One additional provision is relevant to understanding the context of this case: The Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, § 201(a), 116 Stat. 2337 (28 U.S.C. 1610 note), permits attachment of certain blocked assets in terrorism cases. It provides that "[n]otwithstanding any other provision of law," a person who has obtained a judgment against a "terrorist party" under the terrorism exception may attach "the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)" to the extent of any compensatory damages. *Ibid.* The term "terrorist party" includes a designated state sponsor of terrorism.

§ 201(d)(4), 116 Stat. 2340. TRIA defines "blocked assets" to include assets "seized or frozen by the United States" under the Trading with the Enemy Act, 50 U.S.C. 4301 *et seq.*, or the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701-1702. TRIA § 201(d)(2), 116 Stat. 2338-2339. When applicable, TRIA thus authorizes attachment of the blocked assets of a foreign state or its agencies or instrumentalities, without regard to *Bancec* and without requiring a nexus to commercial activity.

3. a. Petitioners hold a $71.5 million judgment against Iran arising out of Iran's role in a 1997 terrorist attack. Pet. App. 1-2. They obtained the judgment under the original version of the terrorism exception, then converted it to a judgment under Section 1605A. *Id.* at 5-6 & n.1. Petitioners registered their judgment in the Northern District of Illinois and sought to attach the Persepolis Collection, a collection of ancient Persian artifacts. *Id.* at 2-3.[3] The collection is owned by Iran but has been on loan to the University since 1937 for research, translation, and cataloging. *Id.* at 4-5, 46.

The district court granted summary judgment to respondents, holding that the collection is immune from attachment under the FSIA. Pet. App. 43-71. First, the court held that the commercial-activity exception in subsection (a) of Section 1610 is inapplicable because it applies only when the foreign state uses the property for commercial activity, and there was no indication that Iran had so used the Persepolis Collection. *Id.* at 50-57.

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[3] Petitioners also sought to attach other Iranian artifacts in the University's possession, as well as artifacts possessed by another institution, but the Persepolis Collection is the only property still at issue. See Pet. App. 2-3, 8-10.

Second, the court held that subsection (g) does not apply, because it is not a freestanding immunity exception. *Id.* at 57-62. Rather, the court concluded, it permits attachment only "*as provided in this section*," and no other provision in Section 1610 applies. *Id.* at 61. Third, the court held that TRIA § 201(a) does not authorize attachment, because the Persepolis Collection is not a "blocked" asset for purposes of TRIA. Pet. App. 67.

b. The court of appeals affirmed. Pet. App. 1-38. The court agreed with the district court (and with the United States as amicus curiae) that Section 1610(a) does not apply because it reaches only property used in commercial activity by the foreign state itself, not by a third party. The court explained that subsection (a) is ambiguous because it uses the passive voice (property "used for commercial activity"). *Id.* at 16-17. The court concluded, however, that the FSIA's statutory declaration of purpose, particularly when read in light of background norms of international law, confirms that the district court's interpretation is correct. *Id.* at 17-21.

The court of appeals also agreed with the district court (and the United States) that subsection (g) of Section 1610 does not provide a basis for attachment of the artifacts because it is not a freestanding immunity exception and no other provision of Section 1610 provides for attachment. Pet. App. 21-35. The court explained that subsection (g)'s phrase "as provided in this section" means that an individual must first show that an immunity exception elsewhere in Section 1610 applies. *Ibid.* Otherwise, the court explained, it would be superfluous for subsections (a)(7) and (b)(3) of Section 1610 to refer to Section 1605A, because any person with a Section 1605A judgment could already proceed under

subsection (g), without satisfying the additional commercial-activity requirements in subsections (a)(7) and (b)(3). *Id.* at 27-28.

The court of appeals recognized that the Ninth Circuit had reached the opposite conclusion in *Bennett* v. *Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016), petition for cert. pending, No. 16-334 (filed Sept. 12, 2016). Pet. App. 34. But the court found *Bennett* unpersuasive. See *ibid.* ("[W]e disagree with the Ninth Circuit's interpretation of subsection (g).").

The court of appeals noted that the Ninth Circuit had relied on statements in two earlier Seventh Circuit decisions, *Wyatt* v. *Syrian Arab Republic*, 800 F.3d 331, 342-343 (2015), cert. denied, 136 S. Ct. 1721 (2016), and *Gates* v. *Syrian Arab Republic*, 755 F.3d 568, 576 (2014). See Pet. App. 34. The court explained that those statements were merely dicta. *Id.* at 31. The court nonetheless overruled *Gates* and *Wyatt* to the extent they could "be read as holding that § 1610(g) is a free-standing exception." *Id.* at 34-35. The panel stated that its decision had been circulated to all Seventh Circuit judges in active service, that five judges were recused, and that a majority had not voted to rehear the case en banc. *Id.* at 35 n.6. Judge Hamilton (the author of *Gates* and *Wyatt*) filed a dissent from denial of rehearing en banc. *Id.* at 39-42. In his view, Section 1610(g) is ambiguous, and he would have resolved that ambiguity by favoring victims of terrorism. *Ibid.*

Finally, the court of appeals held that petitioners could not attach the Persepolis Collection under TRIA because it was not "blocked." Pet. App. 35-38. Petitioners do not seek review of that determination.

DISCUSSION

The petition for a writ of certiorari should be granted, limited to the first question presented. As the court of appeals acknowledged, its interpretation of Section 1610(g) is contrary to *Bennett* v. *Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016), petition for cert. pending, No. 16-334 (filed Sept. 12, 2016), which found Section 1610(g) to be a freestanding exception to attachment immunity under the FSIA. The Ninth Circuit's decision in *Bennett* is wrong, for essentially the reasons stated in the Seventh Circuit's decision below, and the proper resolution of this question is important. Although the United States sympathizes with petitioners and other victims of terrorism, the seizure of a foreign sovereign's property via attachment or execution can affect the United States' foreign relations. The United States therefore has a strong interest in the proper interpretation and application of the FSIA's rules governing judicial seizure of foreign state property in the United States.

This case is a better vehicle than *Bennett* for answering the subsection (g) question. This case arises on an appeal from a final judgment, whereas *Bennett* is an interlocutory order. And particularly if the Court grants review solely on the first question presented in this case, as the United States recommends, the attachment here would stand or fall on the interpretation of subsection (g). By contrast, *Bennett* includes several complicating factors, and the proper interpretation of subsection (g) may ultimately be immaterial.

Review is not warranted on the second question presented. As the court of appeals correctly understood, Section 1610(a) applies when the foreign state uses the targeted property in commercial activity, not when a

third party does. Every other court of appeals to consider the issue has reached the same result. This would also be a poor vehicle for addressing that question, because it is uncertain whether the University has used the Persepolis Collection in commercial activity.

I. THIS COURT SHOULD GRANT REVIEW TO CONSIDER WHETHER SECTION 1610(g) CREATES A FREESTANDING EXCEPTION TO ATTACHMENT IMMUNITY

A. The Decision Below Correctly Interprets Section 1610(g)

1. Subsection (g) provides that "the property of a foreign state" against which a judgment has been entered under Section 1605A, "and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly" in such an entity, "is subject to attachment in aid of execution, and execution, upon that judgment *as provided in this section*, regardless of" the *Bancec* factors discussed above. 28 U.S.C. 1610(g)(1) (emphasis added); Pet. App. 25-26. Subsection (g) thus sets aside the need for a *Bancec* inquiry in certain cases involving the terrorism exception. When a plaintiff obtains a Section 1605A judgment, the plaintiff can attempt to execute against the property of the foreign state itself or an agency or instrumentality, without regard to the *Bancec* factors. That significantly expands the universe of assets potentially available in such cases. But by its terms, the plaintiff still must proceed "as provided in this section." *Ibid.* That is, the creditor must also satisfy one of the exceptions to attachment immunity "as provided in" Section 1610. Congress thus did not take the further step of creating a freestanding exception to attachment immunity that

would override the carefully crafted exceptions to immunity elsewhere in Section 1610. Pet. App. 26-27.

2. The Ninth Circuit's alternative view would render much of the relevant provisions insignificant or superfluous.

a. First, subsection (g)'s statement that property may be attached "as provided in this section" would be essentially meaningless, because the statute would function the same way with or without it. The Ninth Circuit appeared to recognize that the phrase must refer to some other part of Section 1610, and concluded that it "refer[s] to procedures contained in § 1610(f)." *Bennett*, 825 F.3d at 959. But as the court of appeals explained, "it would be very odd" for Congress to refer to subsection (f) in that way. Pet. App. 27. Congress would not be expected to say "this section" when it really meant "the preceding subsection." Cf. *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 938-939 (2017).

Moreover, even on its own terms, the Ninth Circuit's interpretation would not support attachment. Paragraph (f)(1) could theoretically allow the attachment of certain blocked assets—but the President exercised his statutory authority to waive paragraph (f)(1) before it went into effect. See Pet. App. 33-34. Subsection (f) thus has been "inoperative from the start," and "does not allow *any* form of execution." *Id.* at 34. Accordingly, if subsection (g) referred solely to subsection (f), it "would mean no execution at all." *Ibid.*[4]

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[4] The Ninth Circuit noted that paragraph (f)(2) has not been waived. See *Bennett*, 825 F.3d at 959-960 & n.5. But that paragraph does not save the Ninth Circuit's interpretation, because it does not provide for attachment (or even create procedures for attachment); it provides that the State and Treasury Departments "should make

b. Second, the Ninth Circuit's interpretation of subsection (g) would render subsection (a)(7) largely irrelevant. See Pet. App. 27-28. Subsection (a)(7) provides that a foreign state's property used in commercial activity is not immune from attachment if the plaintiff is enforcing a judgment that "relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008)." 28 U.S.C. 1610(a)(7). Section 1605A is the current version of the terrorism exception. See p. 3, *supra*. Subsections (a)(7) and (g) thus work together to enable holders of terrorism-related judgments to pursue property used in commercial activity (via subsection (a)(7)), and to do so whether that property is owned by the foreign state or by its agencies or instrumentalities, without need for a *Bancec* inquiry (via subsection (g)).

The Ninth Circuit's interpretation of subsection (g), however, would make the two provisions work at cross-purposes by enabling Section 1605A creditors to evade subsection (a)(7)'s key limitation. Subsection (a)(7) allows a Section 1605A judgment creditor to pursue property only if it is used in commercial activity—but those same creditors could pursue property without that limitation simply by invoking subsection (g). For those creditors, subsection (a)(7) and its limitations would be superfluous.

Even worse, the Ninth Circuit's interpretation would have made subsection (a)(7) entirely irrelevant when it was adopted. The very same statute—the 2008 NDAA—both amended subsection (a)(7) to refer to Section 1605A and enacted subsection (g). NDAA § 1083(b)(3)(A) and (D), 122 Stat. 341. And at the time, subsection (a)(7)

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every effort" to assist terrorism judgment creditors in identifying attachable property. 28 U.S.C. 1610(f)(2).

referred *solely* to judgment creditors under Section 1605A. § 1083(b)(3)(A), 122 Stat. 341.[5] Thus, under the Ninth Circuit's interpretation, subsection (g)'s enactment rendered subsection (a)(7) completely pointless —even though Congress was making substantive changes to subsection (a)(7) at the very same time.

B. The Decision Below Conflicts With *Bennett*

1. The court of appeals' decision here conflicts with *Bennett*. In *Bennett*, the Ninth Circuit held that subsection (g) "contains a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities." 825 F.3d at 959. On that view, persons with a judgment against a foreign state under Section 1605A need not demonstrate any nexus between the property of the foreign state (or its agency or instrumentality) and commercial activity before proceeding to execution. The court of appeals reached the opposite result here, while acknowledging the split in authority. Pet. App. 34 ("[W]e disagree with the Ninth Circuit's interpretation of subsection (g)."). And respondent Iran, owner of the artifacts at issue, acknowledges the split as well and agrees that the question warrants certiorari. Iran Mem. in Response 14-17.[6]

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[5] Congress only later restored the reference to the prior version of the terrorism exception, Section 1605(a)(7). See Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502(e)(1)(A), 126 Stat. 1260.

[6] Petitioners and Iran contend that the Second Circuit and D.C. Circuit have also decided the issue. See Pet. 22; Iran Mem. in Response 15. In *Weinstein* v. *Islamic Republic of Iran*, 831 F.3d 470, 482-484 (2016), the D.C. Circuit treated subsection (g) as a standalone exception, but without analysis. In *Kirschenbaum* v. *650 Fifth Ave. & Related Props.*, 830 F.3d 107, 123 (2016), the Second Circuit described subsection (g) as a standalone exception, without

The University nonetheless asserts (Br. in Opp. 10-11) that there is no conflict because *Bennett*'s interpretation of subsection (g) was an "alternative ground for the holding"; the Ninth Circuit also found the assets in that case to be attachable under TRIA. An alternative holding is still binding precedent, however, not dicta. See *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *Operating Eng'rs Pension Trust* v. *Charles Minor Equip. Rental, Inc.*, 766 F.2d 1301, 1304 (9th Cir. 1985). Moreover, *Bennett*'s Section 1610(g) analysis—which prompted a dissent solely on that issue, see 825 F.3d at 966-970 (Benson, J., concurring in part and dissenting in part)—gave the Ninth Circuit's judgment a broader scope: It permitted the district court on remand to consider attachment under TRIA *and* Section 1610(g). TRIA permits creditors to recover only up to the amount of their compensatory damages, see § 201(a), 116 Stat. 2337, and only so long as the relevant assets remain "blocked," see *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran* v. *Elahi*, 556 U.S. 366, 369 (2009). Section 1610(g) contains neither limitation. Accordingly, there is a direct conflict on this question.[7]

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analysis, but held that the property was not subject to attachment on other grounds.

[7] The respondents in *Bennett* contend (Br. in Opp. at 19-20, *Bennett*, *supra* (No. 16-334)) that there is no direct conflict because that case involved blocked assets, whereas this case does not, and they argue that paragraph (g)(2) supports this distinction. The University makes no such argument here, and in any event the Ninth Circuit's broad holding forecloses it because there is no suggestion that its interpretation of the reach of subsection (g) is applicable only to blocked assets. See *Bennett*, 825 F.3d at 959 ("We hold that subsection (g) contains a freestanding provision for attaching and execut-

Unless this Court intervenes, the circuit conflict will likely persist. The Ninth Circuit denied en banc review in *Bennett*, even after soliciting (and receiving) from the United States an amicus brief arguing that the panel's interpretation of Section 1610(g) was wrong. 825 F.3d at 954. And although the Ninth Circuit denied rehearing en banc before the Seventh Circuit decided this case and created the circuit conflict, the Seventh Circuit's analysis was similar to the analysis the parties and the United States had already presented to the Ninth Circuit in *Bennett*. It is therefore unlikely that the Ninth Circuit would grant en banc review in a future case to adopt the Seventh Circuit's position.

The Seventh Circuit also declined to grant en banc review here. Pet. App. 35 n.6. This case had the unusual circumstance that a majority of the en banc court was recused, but only one non-recused judge, Judge Hamilton, registered the view that en banc review was appropriate. *Ibid.* It is thus unlikely that the Seventh Circuit would grant en banc review in a future case to adopt the Ninth Circuit's position that the panel squared rejected.

C. The Question Presented Is Important

The meaning of Section 1610(g) is a pure question of statutory interpretation that has divided the circuits and that implicates foreign affairs. The Ninth Circuit's interpretation of subsection (g) significantly broadens its scope by denying attachment immunity for property without any need for a nexus to commercial activity. Congress has carefully crafted exceptions in the FSIA

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ing against assets of a foreign state or its agencies or instrumentalities."). The Ninth Circuit never mentioned paragraph (g)(2). See *id.* at 954-966.

relating to state sponsors of terrorism, and they should not be subject to unwarranted judicial expansion.

The interpretation of subsection (g) may have little practical impact in many cases involving enforcement of judgments obtained under the terrorism exception, because such creditors may be able to attach blocked property under TRIA (as the individual respondents seek to do in *Bennett*), without regard to the interpretation of subsection (g). The interpretation of subsection (g) is critical, however, when the assets at issue do not meet TRIA's specialized definition of "blocked property." § 201(d)(2), 116 Stat. 2338. For example, TRIA would not govern attachment involving judgments against Sudan, because Sudan's assets are no longer blocked for purposes of TRIA, see, *e.g.*, *Harrison* v. *Republic of Sudan*, No. 13-cv-3127, 2017 WL 946422, at *3 (S.D.N.Y. Feb. 10, 2017), or judgments against Iran where the creditor seeks to attach assets that (like the Persepolis Collection) were unblocked by the Algiers Accords, Jan. 19, 1981, 20 I.L.M. 224. The Ninth Circuit's rule would create an exception to immunity for all such unblocked property, even when it lacks any nexus to commercial activity.

D. The Court Should Grant This Petition And Hold The *Bennett* Petition

This case is a better vehicle than *Bennett* for this Court's plenary review. This case arises from a final judgment, and if the Court denies review on the second question presented, as we recommend, see pp. 18-22, *infra*, petitioners' ability to attach the Persepolis Collection will stand or fall on the interpretation of subsection (g). It is undisputed that the collection is Iran's property, and there would be final determinations that it is

not attachable under subsection (a)'s commercial-activity exception or under TRIA. This case also demonstrates the impact of attaching assets that the foreign sovereign has not used in commercial activity and that are not blocked, and thus are not attachable under subsection (a) or TRIA. Petitioners seek to attach what Iran describes as "irreplaceable artifacts of [its] cultural heritage," which it loaned to an American university for academic study. Iran Mem. in Response 26.

By contrast, *Bennett* presents several complicating factors. First, *Bennett* is interlocutory: The district court denied a motion to dismiss, but certified the decision for interlocutory review, and the court of appeals affirmed. 825 F.3d at 957, 966. Ordinarily, an interlocutory posture "itself alone furnishe[s] sufficient ground for the denial" of a petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see, *e.g.*, *Abbott* v. *Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting the denial of certiorari).

Second, in part because of *Bennett*'s interlocutory posture, it is unclear whether the interpretation of subsection (g) will ultimately make a practical difference to the attachment at issue in that case. The Ninth Circuit held that the plaintiffs could attach the assets under TRIA. 825 F.3d at 957-958. And although the panel's interpretation of subsection (g) gives a broader scope to the judgment, see pp. 14-14, *supra*, as a practical matter TRIA will likely resolve the case on remand unless there is some change in circumstances. For subsection (g) to have practical importance, the disputed assets would need to become unblocked during the litigation, or the *Bennett* plaintiffs would have to find enough Iranian assets to satisfy their sizable compensatory damage awards (which dwarf the estimated $17.6 million in

property at issue in that case) and then seek to satisfy their punitive damage awards, which may be enforced under the FSIA but not TRIA.[8]

Third, the *Bennett* respondents may raise alternate grounds for affirming the Ninth Circuit's judgment. See Br. in Opp. at 22, *Bennett*, *supra* (No. 16-334) (arguing that the assets are independently attachable under subsections (a)(7) and (b)(3)); see also *Bennett*, 825 F.3d at 966-970 (Benson, J., concurring in part and dissenting in part) (concluding that the assets would be attachable by virtue of subsection (b)(3)). Those issues could be a distraction in the briefing and argument, and could interfere with the Court's ability to resolve the question on which the circuits are divided. The appropriate course is accordingly for the Court to grant the petition in this case, and to hold the petition in *Bennett* for its decision in this case.

II. THIS COURT SHOULD NOT GRANT REVIEW TO CONSIDER WHETHER A THIRD PARTY'S ACTIVITY CAN SATISFY THE COMMERCIAL-ACTIVITY REQUIREMENT IN SECTION 1610(a)

This Court should limit its review of this case to the first question presented because the second question does not warrant further review. The court of appeals correctly held that Section 1610(a) does not apply here. That holding does not conflict with any decision of this

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[8] The compensatory awards were about $290 million for the *Heiser* plaintiffs, $85 million for the *Acosta* plaintiffs, $12.5 million for the *Bennett* plaintiffs, and $20 million for the *Greenbaum* plaintiffs. See *Estate of Heiser* v. *Islamic Republic of Iran*, 659 F. Supp. 2d 20, 23, 31 (D.D.C. 2009); *Acosta* v. *Islamic Republic of Iran*, 574 F. Supp. 2d 15, 31 (D.D.C. 2008); *Bennett* v. *Islamic Republic of Iran*, 507 F. Supp. 2d 117, 130 (D.D.C. 2007); *Greenbaum* v. *Islamic Republic of Iran*, 451 F. Supp. 2d 90, 105, 108 (D.D.C. 2006).

Court or another court of appeals, and in any event this case would be a poor vehicle for reviewing that question.

A. The court of appeals correctly held that subsection (a) does not permit attachment of the Persepolis Collection because Iran has never "used [that property] for a commercial activity in the United States," 28 U.S.C. 1610(a), and "foreign states may lose execution immunity" under subsection (a) "only by virtue of *their own* commercial use of their property in the United States, not a third party's." Pet. App. 18.

Subsection (a) applies to "[t]he property in the United States of a foreign state, * * * used for a commercial activity in the United States." 28 U.S.C. 1610(a). Because subsection (a) is phrased in the passive voice—"used for a commercial activity," *ibid.*—it is ambiguous standing alone whether the exception is satisfied only when the foreign state itself uses that property in commercial activity, or whether it could also apply when someone else does. See Pet. App. 16-17. To resolve that ambiguity, the statute's words "must be read in their context and with a view to their place in the overall statutory scheme." *Roberts* v. *Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012) (quoting *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). And as the court of appeals correctly explained, the statutory context confirms that only the foreign state's own commercial activity qualifies.

When enacting the FSIA, Congress codified its "[f]indings and declaration of purpose" in 28 U.S.C. 1602. Section 1602 reflects that Congress sought to conform to its understanding of foreign sovereign immunity in international law, under which "states are not immune from the jurisdiction of foreign courts insofar as *their* commercial activities are concerned, and *their*

commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with *their* commercial activities." *Ibid.* (emphases added). Congress's repeated use of "their" indicates that Congress intended that foreign sovereigns themselves (not third parties) must be engaged in the commercial activities that could abrogate immunity.

This understanding is also consistent with the "restrictive theory" of foreign sovereign immunity, which the FSIA has generally been understood to codify. See *Republic of Austria* v. *Altmann*, 541 U.S. 677, 690-691 (2004). Under that theory, a foreign sovereign enjoys immunity for its sovereign or public acts, but not with regard to private acts like commercial activity. The theory is based in part on the idea that "subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts." *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 703-704 (1976) (opinion on White, J.). But when the only commercial activity is by a third party, not the foreign government, that logic ceases to hold.

A contrary reading also would conflict with the ordinary rule that the FSIA's "exceptions to execution immunity are narrower than, and independent from, the exceptions to jurisdictional immunity." Pet. App. 20; see *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014). That is because "[s]eizing a foreign state's property" is recognized as a more serious affront to its sovereignty than "taking jurisdiction in a lawsuit." Pet. App. 20. Petitioners' interpretation of subsection (a), however, would "turn[] this important principle on its head" because a foreign state cannot

lose its immunity to suit based on the commercial activities of a third party. *Ibid.*; see 28 U.S.C. 1605(a)(2) (allowing suit where, *inter alia*, the action is "based upon a commercial activity carried on * * * by the foreign state," or certain acts "in connection with a commercial activity of a foreign state").

B. The court of appeals' interpretation of subsection (a) is consistent with the decisions of every court of appeals to consider the issue. See *Aurelius Capital Partners LP* v. *Republic of Argentina*, 584 F.3d 120, 131 (2d Cir. 2009), cert. denied, 559 U.S. 988 (2010); *Af-Cap, Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1091 (9th Cir. 2007); *Connecticut Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 256 n.5 (5th Cir. 2002).

Contrary to petitioners' suggestion (Pet. 33-35), the court of appeals' decision here does not conflict with *Dean* v. *United States*, 556 U.S. 568 (2009), or *Cassirer* v. *Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) (en banc), cert. denied, 564 U.S. 1037 (2011), because those cases involved different statutes with different text and context. *Dean* held that a sentencing enhancement for firearms cases where "the firearm is discharged" applied regardless of whether the defendant intended to discharge it. 556 U.S. at 571-572. *Cassirer* interpreted 28 U.S.C. 1605(a)(3), which provides an exception to a foreign sovereign's immunity to suit where "rights in property taken in violation of international law are in issue" and there is a commercial activity nexus to the United States. *Ibid.* The court concluded that Section 1605(a)(3) can be satisfied in a case against a foreign sovereign that held the property at the time of suit and engaged in commercial activities in the United States related to the property, even if another foreign sovereign improperly took the property. *Cassirer*, 616 F.3d

at 1028-1032. Accordingly, neither case decided the question here.

Furthermore, although both decisions found support in the statutes' use of the passive voice, see *Dean*, 556 U.S. at 571; *Cassirer*, 616 F.3d at 1028, neither announced an across-the-board rule that the passive voice always means that the identity of the actor is irrelevant, without regard to a particular statute's context or purpose. Indeed, the Ninth Circuit emphasized in *Cassirer* that its interpretation was consistent with the FSIA's animating principle of denying states immunity when they engage in their own commercial activity. 616 F.3d at 1030. By contrast, petitioners' interpretation of subsection (a) is in tension with that principle.

C. This case also would be a poor vehicle for reviewing the question. The court of appeals expressed "skeptic[ism] that academic study" of artifacts by the University would even qualify as "commercial activity," Pet. App. 16, and Iran has indicated it believes that no party has ever used the artifacts in commercial activity, Iran Mem. in Response 25-26. The United States takes no position on this issue, and the court of appeals did not address it. But the possibility that subsection (a) may be inapplicable, regardless of how it is interpreted, makes this a poor vehicle for this Court to interpret it.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the first question presented.

Respectfully submitted.

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